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SHERRER, EXAMINER

ART UNIT	PAPER NUMBER
	7
	1302

DATE MAILED: 05/10/94

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

This application has been examined Responsive to communication filed on _____ This action is made final.

A shortened statutory period for response to this action is set to expire 3 month(s), 0 days from the date of this letter.
Failure to respond within the period for response will cause the application to become abandoned. 35 U.S.C. 133

Part I THE FOLLOWING ATTACHMENT(S) ARE PART OF THIS ACTION:

1. Notice of References Cited by Examiner, PTO-892.
2. Notice of Draftsman's Patent Drawing Review, PTO-948.
3. Notice of Art Cited by Applicant, PTO-1449.
4. Notice of Informal Patent Application, PTO-152.
5. Information on How to Effect Drawing Changes, PTO-1474.
6. _____

Part II SUMMARY OF ACTION

1. Claims 1 to 64 are pending in the application.
Of the above, claims 7, 9-14, 20, 22-27, 29-50, 55, 61, 63 are withdrawn from consideration.
2. Claims _____ have been cancelled.
3. Claims _____ are allowed.
4. Claims 1-6, 8, 15-19, 21, 28, 51-54, 56-60, 62, 64 are rejected.
5. Claims _____ are objected to.
6. Claims _____ are subject to restriction or election requirement.
7. This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.
8. Formal drawings are required in response to this Office action.
9. The corrected or substitute drawings have been received on _____. Under 37 C.F.R. 1.84 these drawings are acceptable; not acceptable (see explanation or Notice of Draftsman's Patent Drawing Review, PTO-948).
10. The proposed additional or substitute sheet(s) of drawings, filed on _____, has (have) been approved by the examiner; disapproved by the examiner (see explanation).
11. The proposed drawing correction, filed _____, has been approved; disapproved (see explanation).
12. Acknowledgement is made of the claim for priority under 35 U.S.C. 119. The certified copy has been received not been received been filed in parent application, serial no. _____; filed on _____.
13. Since this application appears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.
14. Other _____

EXAMINER'S ACTION

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Part III DETAILED ACTION

Election/Restriction

1. Claims 29 to 50 are withdrawn from further consideration by the examiner, 37 C.F.R. § 1.142(b), as being drawn to a non-elected method of making a multi-phase strip chewing gum and the apparatus for producing said gum, the requirement having been traversed in Paper No. 4.
2. Applicant's election with traverse of a chewing gum product in Paper No. 4 is acknowledged. The traversal is on the ground(s) that 1)"both components could be "formed" by extrusion, and still fall within the scope of this claim", 2)the apparatus claims contain language contrary to the examiner's conclusion that the claimed apparatus can be used to make ornamental clay constructions, 3)if clay is substituted for the chewing gum the product produced would contain bacteria and due to its nature would be unchewable and therefore could not be placed in the mouth, and 4)"there is no reason why anyone would want to form ornamental clay into the size and shape of a chewing gum product". This is not found persuasive because:

In response to traversal grounds 1), the examiner meant that the product could be co-extruded, not the applicants process of two extrusion steps;

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In response to traversal grounds 2), the fact that the apparatus claims contain language referring to chewing gum and confectionery material does not negate the fact that the apparatus could be used to make ornamental clay constructions and furthermore, the language in the apparatus claims discloses an intended use and is not a positive limitation;

In response to traversal grounds 3), the applicants' process could be coupled to microwave sterilization equipment to eliminate viable organisms which are hazardous to humans. And further, the examiner did not state that the use of clay would produce a chewing gum of high marketplace acceptance along with the property of long lasting chewability;

3. Additional Claims 7, 9 to 14, 20, 22 to 27, 55, 61 and 63 are withdrawn from further consideration by the examiner, 37 C.F.R. § 1.142(b), as being drawn to a non-elected chewing gum product wherein the second mass can be in the form of stripe(s), which run diagonally, or islands, with a rolling compound applied and first and second mass are in a final form of sticks, the requirement having been traversed in Paper No. 6.

4. Applicant's election with traverse of the product made by the process of Example 1 as the species in Paper No. 6 is acknowledged. The traversal is on the ground(s) that "neither M.P.E.P. § 814 or § 808.01(a) have been satisfied". This is not

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found persuasive because it is considered that both requirements have been met.

5. As for complying with M.P.E.P. § 814, the reasons why such limitations, which are considered to restrict the claim to the particular disclosed species, were not mentioned was because it was considered that the restriction requirement was clear with respect to said reasons.

6. If applicants' want to overcome the restriction based on the separate species of the invention then they should admit to the obviousness of one species over the other. A portion of MPEP Form paragraph 8.01 is printed below to further reiterate this option.

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. § 103 of the other invention.

7. As for complying to M.P.E.P. § 808.01(a), the examiner in no way stated that he considered each of the Examples, found in the specification, constituted or represented different species, but merely suggested that Example 1 could be used to illustrate a species, i.e., one mass in the form of an undulating rope being applied to a second mass in the form of a slab. Furthermore, there is no disclosure of the relationship between the different

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species, i.e., a mass being applied that is in the form of an undulating stripe, diagonal stripe or islands to another mass in the form of a slab or disk shape.

8. The requirements are still deemed proper and are therefore made FINAL.

9. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 C.F.R. § 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a diligently-filed petition under 37 C.F.R. § 1.48(b) and by the fee required under 37 C.F.R. § 1.17(h).

Drawings

10. This application has been filed with informal drawings which are acceptable for examination purposes only. Formal drawings will be required when the application is allowed.

11. The drawings are objected to because

- a. The auger referred to in the specification on page 11, line 1, of the extruder 63 cannot be found in the Figure;
- b. It is unclear as to what items 102 and 107 are in Figure 9;

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- c. In Figure 13 the number 124 seems to identify the slab and not the stripes;
- d. In Figure 14 the numbers 127 and 136 do not identify any part of the apparatus with the use of an arrow;
- e. In Figure 14 the number located above number 123 is illegible;
- f. In Figure 16 item 138 is numbered 133;
- g. In Figure 18 it unknown as to what 139 identifies;
- h. In Figures 14 and 15 it is unclear as to what the numbers 145 and 151 identify. Correction is required.

Specification

12. The use of the trademarks "BUBBLETAPE[®], TEFLON[®], ASPARTAME[®], ACESLUFAM K[®], DOMINO PIZZA[®]" have been noted in this application. They should be capitalized wherever they appears and be accompanied by the generic terminology.

Although the use of trademarks is permissible in patent applications, the proprietary nature of the marks should be respected and every effort made to prevent their use in any manner which might adversely affect their validity as trademarks.

13. The disclosure is objected to because of the following informalities:

- a. On page 6, lines 27 and 28, it states that in Figure 4 "round bits" are shown, but these cannot be found;
- b. On page 10, line 25, the specification refers to a "roller 101" which cannot be located in Figure 11;

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- c. On page 11, line 16, the specification refers to a "device 79" which could not be found in the figures;
- d. On page 12, line 3, the specification refers to a "sheet 20" which could not be found in Figure 13;
- e. On page 16, line 17, the specification refers to a "tray 181" which could not be found in the figures;
- f. on page 19, line 13, the word "bit " should be spelled bin;
- g. On page 19, line 30, a period should be deleted from the end of the sentence. Appropriate correction is required.

Claim Rejections - 35 USC § 112

14. Claims 16 to 28 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

15. Due to the applicants' amending Claim 15 to make it a product by process claim the dependent claims became indefinite since they refer to a "method" and not a product. Specifically, it is unclear whether Claims 16 to 28 are method or product claims.

16. Claim 17 is considered indefinite since there is no antecedent basis for the phrase "continuous slab" found in Claim 15.

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Claim Rejections - 35 USC § 102

17. The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --
(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claim Rejections - 35 USC § 103

18. The following is a quotation of 35 U.S.C. § 103 which forms the basis for all obviousness rejections set forth in this Office action:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Subject matter developed by another person, which qualifies as prior art only under subsection (f) or (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

19. Claims 15, 28, 51, 52, 54, 56 to 58, 60, 62 and 64 are rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103 as obvious over Puglia et al. (U.S. Patent 4,352,824).

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20. Puglia et al. teaches the production of a chewing gum which is comprised of a chewing gum base which is combined with a "pre-sweetened or pre-flavored layer or slab of chewing gum ... by lamination, co-extrusion" (col. 1, lines 50 to 54) so that such "gums surround, are swirled in and around or partially coat the chewing gum of the invention" (col. 2, lines 50 to 53). "If desired, solid flavor may be added and mixed with the gum which may then be rolled, scored, cut into desired shapes and wrapped" (col 4, lines 20 to 24).

21. There is no disclosure of a "rolling compound" being used, as specified in Claim 28.

22. Puglia et al. inherently teaches, through the use of the phrase "partially coat", that one layer of gum will be larger than the other and further by using different compositions for each layer, such as colors, the gum will be multi-colored.

23. If the Puglia et al. reference does not explicitly mention all of the limitations found in the above cited claims then it would have been obvious to one of ordinary skill in the art since it is not seen where the different design considerations are unobvious.

24. Claims 1 to 6, 8, 15 to 19, 21, 28, 51 to 54, 56 to 60, 62 and 64 are rejected under 35 U.S.C. § 102(b) as anticipated by or, in the alternative, under 35 U.S.C. § 103 as obvious over Cherukuri et al. (US Patent 4,971,806.).

25. Cherukuri et al. disclose a multi-layered chewing gum composition composed of "at least two combined compositions having different base constituents" (col. 2, lines 7 to 12.) The gum layers are "laminated together by conventional methods, e.g., co-extrusion, roller pressing, etc." (col. 2, lines 32 to 33.) The inventors contemplate using a clear wrapping for their product so that "the consumer is able to observe the multi-color designs and color variations in the compositions of this invention. The chewing gum composition contains flavors in the different layers which "may be the same or different and the amounts may be the same or different" (col. 3, lines 57 to 60.)

26. Table III, in col. 11 of the specification, shows the combination of colors which are contemplated by the invention. From the teaching, cited above, since a multi-color design is viewable by the consumer then it is apparent that one of the layers is larger than the other layer thereby allowing the viewing of at least two colors.

27. The patent does not disclose the use of a "rolling compound" and therefore the limitations of Claim 28 are met.

28. If Cherukuri et al. does not explicitly show the various forms which the final chewing gum can have then it is considered that it would have been obvious to one of ordinary skill in the art to vary the shape of the chewing gum product of Cherukuri et al. to make the product more attractive to the consumer since it

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is known in the chewing gum art to mix two gums together in attractive patterns.

29. Finally, to have one layer being larger than the other layer is well known in the confection art. For example, chocolate chip cookies, where the chocolate chips are imbedded into the cookie. Therefore, applicants' diverse arrangements of different gum layers is not seen as being patentably distinct from that already found in the marketplace.

Conclusion

30. No claim is allowed.

31. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847.

32. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0651.



Curt Sherrer

April 29, 1994



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SUPERVISORY PATENT EXAMINER
GROUP 130